Norbed bin Husain v Malaysia Airport Holdings Bhd & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–37–02 OF 2023
WAN AHMAD FARID J
4 JULY 2024

Administrative Law — Judicial review — Application — Application to quash the decision by the employer — Applicant not fit to work based on the medical report — Whether the cessation of the applicant's employment on medical grounds was for just cause or excuse — Whether the Industrial Court was correct in concluding that the applicant could be dismissed summarily without having to go through the Medical Board — Rules of Court 2012 O 53 — Industrial Relations Act 1967 s 17(1)(a)

Due to the incident in Penang International Airport whereas one of the first respondent — a firefighter (AFRS personnel) had collapsed during the emergency drill, the first respondent decided to have all its AFRS employees who were considered of a 'high risk' age group and a history of medical condition to undergo a medical examination. Sometime in October 2020, the first respondent identified the applicant and several other employees to undergo a compulsory medical examination. The medical examination was to ensure their fitness for continued employment as a firefighter. The applicant was selected to undergo the medical examination due to his age and medical history of osteoarthritis. Then, the attending doctor provided a written medical opinion on the applicant dated 28 September 2020, that: (a) the applicant had osteoarthritis and osteophytes on both knees; (b) the applicant was also diagnosed with multiple osteophytes and a narrowing joint between the intervertebral spaces on his lumbar spine; (c) The applicant's above musculoskeletal condition would limit his ability to respond to emergencies, which required high physical strength within a quick response time; and (d) the musculoskeletal condition might deteriorate if he continues to undertake his job scope. The attending doctor observed that the application was not to fit to work as AFRS personnel. Given the high risk that the applicant might suffer injuries in carrying out his job functions, the first respondent was of the view that it was no longer able to maintain the applicant in the employment due to his medical condition. Due to the medical opinion and after discussing his health condition with the applicant, the first respondent decided to cease the applicant's employment on medical grounds from 6 November 2020. Aggrieved by the said decision, the applicant filed a representation for unfair dismissal at the Industrial Relations Department. The dispute was subsequently referred to the Industrial Court for an award. The Industrial Court subsequently handed down the award on 21 November 2022 and

dismissed the applicant's claim. Thus, this judicial review application was made.

Held, allowing the application:

(1) It was the pleaded case of the applicant that the medical report did not conclusively state that the applicant should be medically boarded out. On the contrary, the medical report suggested that the applicant should be transferred to another department for work tasks that did not require heavy physical strength, prolonged standing, walking, or lifting heavy loads (see para 36).

(2) The court was of the view that first respondent 'may' retire its employees on medical grounds, if it chooses to do so, it shall appoint a Medical Board to investigate further on the panel doctor's written opinion and await the Medical Board's recommendation. Under no circumstances could the first respondent act unilaterally and dismiss the applicant summarily without having to go through the Medical Board. In short, it could not treat the words as mere tautology or surplusage. By ignoring the role of the Medical Board, the decision of the first respondent was bad in law. The award of the Industrial court was tainted with *Anisminic error*, *Wednesbury* unreasonableness and procedural impropriety (see paras 45–46, 49 & 53).

[Bahasa Malaysia summary

Disebabkan kejadian di Lapangan Terbang Antarabangsa Pulau Pinang di mana salah seorang responden pertama — seorang anggota bomba (anggota AFRS) telah rebah semasa latihan kecemasan, responden pertama memutuskan untuk mempunyai semua pekerja AFRSnya yang dianggap sebagai kumpulan umur 'berisiko tinggi' dan sejarah keadaan perubatan untuk menjalani pemeriksaan perubatan. Pada Oktober 2020, responden pertama mengenal pasti pemohon dan beberapa pekerja lain untuk menjalani pemeriksaan perubatan wajib. Pemeriksaan perubatan itu adalah untuk memastikan kecergasan mereka untuk meneruskan pekerjaan sebagai anggota bomba. Pemohon telah dipilih untuk menjalani pemeriksaan perubatan kerana usia dan sejarah perubatannya yang menghidap osteoarthritis. Kemudian, doktor yang merawat memberikan pendapat perubatan bertulis mengenai pemohon bertarikh 28 September 2020, bahawa: (a) pemohon menghidap osteoarthritis dan osteophytes pada kedua-dua lutut; (b) pemohon juga telah didiagnosis dengan pelbagai osteofit dan sendi yang menyempit antara ruang intervertebral pada tulang belakang lumbarnya; (c) keadaan muskuloskeletal atas pemohon akan mengehadkan keupayaannya untuk bertindak balas terhadap kecemasan, yang memerlukan kekuatan fizikal yang tinggi dalam masa tindak balas yang cepat; dan (d) keadaan muskuloskeletal mungkin merosot jika dia terus menjalankan skop kerjanya. Doktor yang merawat mendapati bahawa permohonan itu tidak sesuai untuk bekerja

sebagai kakitangan AFRS. Memandangkan risiko tinggi pemohon mungkin mengalami kecederaan dalam menjalankan fungsi pekerjaannya, responden pertama berpandangan ia tidak lagi mampu mengekalkan pemohon dalam pekerjaan kerana keadaan kesihatannya. Disebabkan oleh pendapat perubatan dan selepas membincangkan keadaan kesihatannya dengan pemohon, responden pertama memutuskan untuk memberhentikan pekerjaan pemohon atas alasan perubatan mulai 6 November 2020. Terkilan dengan keputusan tersebut, pemohon memfailkan representasi untuk pemecatan tidak adil di Jabatan Perhubungan Perusahaan. Pertikaian itu kemudiannya dirujuk ke Mahkamah Perusahaan untuk mendapatkan award. Mahkamah Perusahaan kemudiannya mengeluarkan award pada 21 November 2022 dan menolak tuntutan pemohon. Justeru, permohonan semakan kehakiman ini dibuat.

Diputuskan, membenarkan permohonan:

(1) Ia adalah kes yang diplidkan pemohon bahawa laporan perubatan itu tidak secara konklusif menyatakan bahawa pemohon harus mendapat rawatan perubatan. Sebaliknya, laporan perubatan mencadangkan bahawa pemohon perlu dipindahkan ke jabatan lain untuk tugas kerja yang tidak memerlukan kekuatan fizikal yang berat, berdiri lama, berjalan atau mengangkat beban berat (lihat perenggan 36).

(2) Mahkamah berpendapat bahawa responden pertama 'boleh' memecat pekerjanya atas alasan perubatan, jika ia memilih untuk berbuat demikian, ia hendaklah melantik Lembaga Perubatan untuk menyiasat lebih lanjut mengenai pendapat bertulis doktor panel dan menunggu cadangan Lembaga Perubatan. Dalam apa jua keadaan, responden pertama tidak boleh bertindak secara unilateral dan memecat pemohon secara ringkas tanpa perlu melalui Lembaga Perubatan. Pendek kata, ia tidak boleh menganggap perkataan itu sebagai tautologi atau lebihan semata-mata. Dengan mengabaikan peranan Lembaga Perubatan, keputusan responden pertama adalah buruk di sisi undang-undang. Award Mahkamah Perusahaan telah dicemari dengan kesilapan *Anisminic*, ketidakwajaran *Wednesbury* dan ketidakwajaran prosedur (lihat perenggan 45–46, 49 & 53).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Azhar Victor v Malaysian Airlines System Sdn Bhd [2012] 4 MLJ 226, HC (folld)

Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111, SC (refd)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546; [2009] 1 CLJ 786, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 17(1)(a)
Occupational Health and Safety Act 1994 ss 15, 17

Habib Rahman bin Seeni Mohideen (Ezrilaw Firm) for the applicant.
Raymond Low (with Adam Thye Yong Wei) (Shearn Delamore & Co) for the first respondent.

Wan Ahmad Farid J:

[1] There are two judicial review applications before me — WA-25–37–02 of 2023 ('JR No 37') and WA-25–38–02 of 2023 ('JR No 38').

[2] By the agreement of the parties, both cases are heard together. Parties also agreed for JR No 37 to be the anchor case.

JR NO 37: THE FACTUAL BACKGROUND

[3] The applicant is a former employee of the first respondent. He commenced employment, initially with the Department of Civil Aviation, as a firefighter on 2 January 1985.

[4] Pursuant to the corporatisation of part of the Department of Civil Aviation, the applicant was offered employment as a firefighter *Ahli Bomba* with Malaysia Airports Bhd vide a letter dated 1 October 1992. As such, the respondent contended that the offer of employment was a fresh employment and commenced only on 1 November 1992.

[5] The applicant's job grade was eventually elevated from Grade 12 to 13, effective on 1 July 2007. His last-held designation was as a firefighter in the first respondent's Airport Fire Rescue Services ('AFRS') with a basic salary of RM4,434.11.

[6] Sometimes in October 2019, a full-scale rescue emergency drill was held at the Penang International Airport. Unfortunately, during the emergency drill, one of the AFRS officers collapsed and died thereafter.

[7] Owing to the said incident, the first respondent decided to undertake an exercise to have all of its AFRS employees who were considered of a 'high risk' age group and a history of medical condition to undergo a medical examination. The exercise was to determine whether they were fit for official duties or otherwise.

[8] In any event, it is the first respondent's obligation under the

Occupational Health and Safety Act 1994 ('OSH Act') to maintain a safe and healthy workplace and premises. It is therefore the first respondent's position that it is necessary for the applicant, as a firefighter, to be physically fit to carry out his duties. Any firefighter who does not measure up to the required level of fitness will pose a life, safety and health risk to users, airport employees and visitors to the airport.

[9] Sometime in October 2020, the first respondent identified the applicant and several other employees to undergo a compulsory medical examination. The medical examination is to ensure their fitness for continued employment as a firefighter.

[10] The applicant was selected to undergo the medical examination due to his age and medical history of osteoarthritis.

[11] The applicant undertook the medical examination at Klinik Primer Tanjung Chat, Kota Bharu, Kelantan, on 24 September 2020. It was conducted by a certified Occupational Safety Health ('OSH') doctor.

[12] The attending doctor provided a written medical opinion on the applicant dated 28 September 2020. The opinion inter alia states as follows:

(a) the applicant has osteoarthritis and osteophytes on both knees;

(b) the applicant was also diagnosed with multiple osteophytes and a narrowing joint between the intervertebral spaces on his lumbar spine;

(c) the applicant's above musculoskeletal condition will limit his ability to respond to emergencies, which requires high physical strength within a quick response time; and

(d) the musculoskeletal condition may deteriorate if he continues to undertake his job scope.

The attending doctor, Dr Mohd Fadzli bin Mohd Noor, made the following observation:

> *Fitness to work*
>
> Considering AFS work task as given in checklist, he is NOT FIT to work as AFRS Personnel.

[13] Given the high risk that the applicant may suffer injuries in carrying out his job functions, the first respondent was of the view that it was no longer able to maintain the applicant in the employment due to his medical condition.

[14] Due to the medical opinion from Dr Mohd Fadzli and after discussing

his health condition with the applicant, the first respondent decided to cease the applicant's employment on medical grounds from 6 November 2020. The letter from the first respondent, dated 6 October 2020, states, inter alia, as follows:

> *BERSARA KERANA HILANG UPAYA ATAS SEBAB-SEBAB KESIHATAN*
>
> Adalah saya merujuk kepada Keputusan Laporan Pemeriksaan Kesihatan daripada Klinik Primer Tanjong Chat bertarikh 28 September 2020 mengenai perkara yang tersebut di atas.
>
> Berdasarkan kepada keputusan tersebut, tuan adalah disarakan kerana hilang upaya atas sebab-sebab kesihatan mengikut Artikel 31 Perjanjian Bersama (Ke Sembilan) berkuatkuasa mulai 06 November 2020. Hari terakhir tuan bertugas di Malaysia Airports Sdn Bhd adalah pada 05 November 2020.

[15] Aggrieved by the decision of the first respondent, the applicant filed a representation for unfair dismissal at the Industrial Relations Department. The dispute was subsequently referred to the Industrial Court for an award.

AT THE INDUSTRIAL COURT

[16] The Industrial Court subsequently handed down the award on 21 November 2022 and dismissed the applicant's claim.

[17] The issue before the Industrial Court is quite straightforward. It is this — whether the cessation of the applicant's employment on medical grounds was for just cause or excuse.

[18] In his grounds of award, the learned chairman of the Industrial Court made the following findings:

(a) the certified medical opinion of Dr Mohd Fadzli, COW-1A, confirmed that the applicant was unfit to carry out his duties as an AFRS firefighter.

(b) COW-1A confirmed that the applicant had no prospect of recovery from his medical conditions.

(c) there was a high risk for the applicant to carry out his duties as an AFRS firefighter.

(d) the first respondent had to uphold its obligation under ss 15 and 17 of the OSH Act and consider the risk to the applicant, his colleagues and the members of the public had the applicant continued carrying out his duties as an AFRS firefighter.

(e) there were no alternative available vacancies suitable for the applicant.

[19] Dissatisfied with the award of the Industrial Court, the applicant

commenced this application for judicial review to quash the same.

AT THE HIGH COURT

[20] This application for judicial review is supported by the affidavit of the applicant in encl 3 ('AIS3'). Leave to commence judicial review was granted by this court on 15 March 2023.

[21] Before me, learned counsel for the applicant referred to article 31 of the ninth collective agreement between Malaysia Airport Holdings Bhd and Kesatuan Pekerja-Pekerja Malaysia Airports Semenanjung dated 7 January 2020. Learned counsel submitted that since the first respondent relied on article 31 in dismissing the applicant, it is therefore vital for the Industrial Court to consider whether the applicant's dismissal complies with the said article.

[22] Article 31 provides as follows:

> 31.1 Pekerja yang mengalami hilang upaya boleh memohon untuk bersara kerana hilang upaya dengan mengemukakan laporan perubatan yang disahkan oleh Doktor Panel Syarikat sebagai bukti bahawa dia tidak dapat meneruskan perkhidmatannya secara aktif dengan syarikat sama ada kerana masalah fizikal dan/atau mental.
>
> 31.2 Syarikat juga boleh mensarakan pekerja setelah dirujuk kepada Lembaga Perubatan atau atas perakuan sebuah lembaga perubatan yang ditubuhkan oleh syarikat.
>
> 31.3 Faedah persaraan terakru akan dibayar berdasarkan Artikel 30.2.3.

[23] Based on the said article, learned counsel for the applicant submitted that the mechanism provided by the collective agreement is for the first respondent to establish a Medical Board or *Lembaga Perubatan*. According to learned counsel, the collective agreement clearly imposes a duty to the first respondent to go through the Medical Board prior to the dismissal of the applicant.

[24] In the circumstances, learned counsel submitted that the learned Chairman of the Industrial Court had erred in concluding that the first respondent's reliance on the written opinion of Dr Mohd Fadzli was sufficient to dismiss the applicant without having first referred the applicant's case to the Medical Board.

[25] Learned counsel then submitted that the failure of the learned Chairman to appreciate the importance of article 31.2 of the collective agreement amounted to a failure to take into account relevant considerations.

[26] According to learned counsel for the applicant, by virtue of s 17(1)(a) of the Industrial Relations Act 1967 ('the IRA'), the collective agreement is binding on all of the parties therein.

THE FIRST RESPONDENT'S RESPONSE

[27] On the application of article 31 of the collective agreement, learned counsel for the first respondent contended that it has never been raised in the pleadings, evidence or submissions in the Industrial Court proceedings.

[28] The issue of non-compliance with article 31 was never an issue before the Industrial Court.

[29] The extension of the argument is that since it was never raised at the Industrial Court, it could not have been a relevant issue before the Industrial Court, to begin with. In short, learned counsel submitted that the issue of the application of article 31 is a mere afterthought.

[30] In any event — learned counsel submitted — even if it was raised at the Industrial Court, the procedure stipulated in article 31.2 of the collective agreement is not mandatory. In short, it does not need to be complied with. The reason, according to learned counsel, is that article 31.2 employs the words: 'juga boleh mensarakan pekerjanya setelah dirujuk kepada Lembaga Perubatan ...'. Learned counsel contended that the phrase 'juga boleh' does not indicate mandatoriness.

[31] The first respondent's argument is that it is sufficient for the company to obtain medical information before making a decision on whether to cease the applicant's employment on medical grounds that is sufficient.

[32] But even if there were a breach of article 31, which learned counsel denied, at best, according to learned counsel, it would merely amount to procedural non-compliance. It would not have rendered a fair dismissal otherwise unfair. Learned counsel cited *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 (SC) as an authority to the said proposition. The case carries the proposition that the observance of procedural safeguards is only applicable in respect of a hearing before an administrative tribunal.

[33] As to the written opinion of Dr Mohd Fadzli and his competency as a medical expert, learned counsel for the first respondent submitted that it was never challenged during cross-examination at the proceedings before the Industrial Court. Learned counsel contended that evidence not challenged during cross-examination must be deemed to be accepted; *Aik Ming (M) Sdn*

Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639 (CA). A

ANALYSIS

[34] I do not think that the applicant's medical condition, as confirmed by Dr Mohd Fadzli, is in dispute. At the hearing before the Industrial Court, the applicant did not seriously challenge the expert opinion of Dr Mohd Fadzli. B

[35] The main issue to be determined by this court is whether the Industrial Court was correct in concluding that the applicant could be dismissed summarily by the first respondent without having to go through the Medical Board. C

[36] In any event, it is the pleaded case of the applicant that the medical report did not conclusively state that the applicant should be medically boarded out. On the contrary, the medical report suggested that the applicant should be transferred to another department for work tasks that do not require heavy physical strength, prolonged standing, walking, or lifting heavy loads. D

[37] Now, what is the process stipulated in article 31 of the collective agreement? First, under article 31(1), the employee may opt to retire early by producing a medical report prepared by any of the doctors on the company panel. There is no mention of the Medical Board. E

[38] Secondly, under article 31(2), the company may take steps to retire the employee. If the company takes this option, the process must be referred to the Medical Board appointed by the company. Only upon the certification made by the Medical Board can the employee be made to retire early. There is no provision in article 31(2) for the first respondent company to summarily force the applicant to retire early purely based on the medical report. F G

[39] To begin with, there is no doubt that the collective agreement is binding on the parties. H

[40] The next question is whether it is incumbent on the first respondent to form and refer the matter to the Medical Board. In *Azhar Victor v Malaysian Airlines System Sdn Bhd* [2012] 4 MLJ 226, the plaintiff applied to be medically boarded out ('MBO') because of his medical condition. The plaintiff asked the defendant to convene a Medical Board to decide on his fitness to continue working. That application was rejected by the defendant. The plaintiff said he was examined by the defendant's consultant physician and a consultant neurologist at a private hospital. Both specialists had recommended to the defendant that he was not fit to continue in employment and should be I

MBO. This, too, was rejected by the defendant.

[41] Central to the plaintiff's claim was article 35 of the collective agreement. It provides as follows:

> The benefits set out in paragraphs (2) of this article shall, subject to the provisions of paragraph (3) of this article, be paid if any staff:
>
> (a) is medically boarded out on the recommendations of the Medical Board contained in a report stating that they have examined the staff concerned and, in their considered opinion, the staff is permanently incapacitated from continuing in his employment or from taking up any form of alternate employment compatible with his qualifications, experience and salary;
>
> (b) dies whilst in the service of the company.

[42] Aggrieved by the continued refusal of the defendant, the plaintiff filed an action against the defendant, claiming that the defendant had breached an implied term of the 2005 collective agreement — between the defendant and the Malaysian Airlines System Managerial Staff Association in failing to convene a Medical Board to assess his health despite circumstances warranting it. The plaintiff claimed the defendant's decision not to convene the Board was an unfair and injudicious exercise of discretion.

[43] In short, the plaintiff alleged that his condition entitled him to be MBO under article 35. However, at the trial, the defendant said it had the absolute prerogative to decide whether or not to refer any of its employees and nothing in the collective agreement compelled it to do so.

[44] At the High Court, the question posed was whether the defendant was required to convene a Medical Board and refer the plaintiff to the Medical Board for medical examination and eventually give a recommendation under article 35(1)(a) of the Collective Agreement. Suraya J (later JCA) answered this in the affirmative. The learned judge then went on and further held as follows:

> From the facts of the case, the decision not to refer the plaintiff to Medical Board (rejection of the setting up of a Medical Board) was not fair, just or reasonable without discrimination and bias. This is so since there were reports from medical experts that say that the plaintiff should be MBO since he is unfit to do his job. It is only fair, just and reasonable that the defendant set up a Medical Board to investigate further and await the recommendation of the Medical Board.

[45] Applying the said proposition to the facts of the case, I cannot respectfully agree with the learned counsel for the first respondent's argument that article 31(2) is not mandatory. While the first respondent 'may' retire its employees on medical grounds, if it chooses to do so, it shall appoint a Medical

Board to investigate further on the panel doctor's written opinion and await the Medical Board's recommendation.

[46] Under no circumstances can the first respondent act unilaterally and dismiss the applicant summarily without having to go through the Medical Board. To my mind, the court must give meaning to the phrase 'Medical Board'. In short, it cannot treat the words as mere tautology or surplusage. To say that the first respondent can dismiss the applicant or retire him early purely based on a medical opinion is to ignore the presence of the words 'Medical Board'.

[47] This is certainly not the intention of the parties.

[48] In *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; [2009] 1 CLJ 786 (CA), the Court of Appeal reiterated the principle that in order to avoid superfluity, the court must give effect to *every provision* of the contract. In other words, the court cannot construe the words in an entirely different sense from their natural and grammatical meaning. In short, the court cannot give meaning to a provision totally contrary to the meaning that it bears in plain language.

[49] By ignoring the role of the Medical Board, the decision of the first respondent is bad in law.

[50] While I can perfectly understand that first respondent had to uphold its obligation under ss 15 and 17 of the OSH Act , due process must be observed.

[51] Learned counsel for the first respondent submitted that the issue of compliance with article 31 of the CA was never raised in any of the pleadings and therefore, could not now be taken up before this court as an error of the Industrial Court. With respect, the issue was duly pleaded in the statement of case before the Industrial Court. In para 5.3(a) of the statement of case, the applicant pleaded as follows:

> 5.3 Vide a letter from the Company to the Claimant dated 6.10.2020 the Company had informed the Claimant among others, as follows:
>
> (a) As a result of the medical check-up, the Claimant was retired early due to disability pursuant to Article 31 of the Ninth Collective Agreement between Malaysia Airport Holdings Berhad and Kesatuan Pekerja-Pekerja Malaysia Airports Semenanjung dated 7.1.2020 ('the Collective Agreement').

In any event, the applicant has also exhibited the collective agreement in the statement of case.

FINDINGS

[52] In the circumstances, my findings are as follows:

(a) the Industrial Court had erred in holding that ss 15 and 17 of the OSH Act took precedence, the moment Dr Mohd Fadzli confirmed that the applicant had no prospect of recovery from his medical conditions;

(b) at the risk of being repetitive, the opinion of Dr Mohd Fadzli must be further investigated by the Medical Board before the first respondent could retire the applicant under article 31(2);

(c) in any event, the Dr Mohd Fadzli did not conclusively state that the applicant should be medically boarded out. On the contrary, the medical report suggested that the applicant should be transferred to another department; and

(d) the opinion of Dr Mohd Fadzli is not the determining factor that justified the cessation of the applicant's employment on medical grounds. In short, due process must be adhered to by the first respondent by establishing the Medical Board. It is the Medical Board that has the final say in determining the status of the applicant's employment and not Dr Mohd Fadzli.

[53] The award of the Industrial Court is tainted with *Anisminic error*, *Wednesbury* unreasonableness and procedural impropriety.

[54] An order of certiorari is hereby issued to quash the award.

[55] As agreed by the parties, this decision will bind JR No 38.

[56] Costs is fixed for RM5,000 for each case subject to allocatur.

Application allowed.

Reported by Muhamad Azham Marwan